



TERRITORIALITY IN INTELLECTUAL PROPERTY LAW: ANALYSING WHETHER THE PRINCIPLE OF TERRITORIALITY SHOULD BE APPLICABLE ONLINE

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ABSTRACT

This paper will argue that, with regards to intellectual property law, the principle of territoriality should not be applicable online. The central concept of territoriality has first been explained, with its evolution briefly outlined. Several pieces of literature have then been assessed, accounting for contrasting viewpoints on the topic. Subsequently, key arguments showcase the infeasibility of applying territoriality online, and the pessimistic implications of doing so are elaborated. Potential opposing viewpoints have been refuted, with their weaknesses evidently identified. Following a thorough investigation and analysis, this paper concludes that territoriality should not be applicable online.

KEYWORDS: Intellectual Property Law, Territoriality

INTRODUCTION

Intellectual Property (IP) law comprises laws handling the protection and enforcement of the rights of creators and owners of intellectual creations. These are inclusive of inventions, brands, music, designs and other works (*What Is Intellectual Property Law?* n.d.). The main areas of intellectual property are copyright, trademarks, patents, and trade secrets (Intellectual Property Law, n.d.). Intellectual Property rights are non-physical rights and can be thought of as an abstract object which can be “owned” without a specific physical manifestation of that object (Drahos, 1998).

The principle of territoriality, to be examined further in this paper, details that intellectual property rights are limited to the territory of the country where they have been granted (Oke, 2018). The exclusive right can only cover activities that occur within the respective territory. An invention or work may thus be protected in one nation, but unprotected in another (Peukert, 2012).

Historically, the territoriality principle detailed that IP rights do not extend beyond the territory of the sovereign who has granted these rights to begin with (Drahos, 1998). With time, states began considering the possibility of international cooperation on intellectual property, negotiating bilateral agreements due to concern for the problem of free riding. However, the protection that bilateralism awarded authors was never entirely satisfactory. Serious international cooperation was then brought forth by two multilateral conventions: The Paris Convention of 1883 (for the protection of industrial property) and the Berne Convention of 1886 (for the protection of artistic and literary works) (Drahos, 1998). Thus, IP law evolved from the concept of territoriality and into the above multilateral agreements (Oke, 2018).

With the advent of the internet, traditional territoriality

was placed under intense pragmatic pressure due to the deconstruction of matter and space as such (Oke, 2018). Now that innovations are often the products of cross-border collaboration, the territoriality principle appears to most as an outdated concept that focuses on isolated national sovereigns with a continually reducing ability to regulate the conduct of their citizens (Peukert, 2010). Nevertheless, it has also been viewed as a tool to aid in the suitable structuring of national IP laws (Oke, 2018), and one that may benefit innovation, bringing forth a contrasting perspective.

This paper will argue that with existing technology, territoriality should not be applicable online with regards to IP law. This is due to the confine-less nature of the internet rendering it quixotic to determine boundaries, and the undesirable repercussions of doing so.

LITERATURE REVIEW

Two schools of thought have emerged arguing both for and against the application of territoriality online in IP law.

Oke (2018) is a proponent to this application and highlights how numerous states aim to tailor intellectual property laws to suit their technological and economic needs, with territoriality being the befitting tool to do so. Oke puts forth Kur and Dreier’s views detailing that the territoriality principle provides nations the “freedom to adjust their IP policies.”

Contrastingly, Anzelmo (2005) notes the impotence of geographical territoriality. It was reasoned that this “ineffective nature” is due to the reduced relevance of physical location. The internet transcends the traditional concepts of borders and therefore forms a single transnational network. Existing in an immaterial dimension, no clear link exists between cyberspace addresses and real space locations, with interactions between site addresses further intensifying the complexity of the issue.

It is for these reasons that Anzelmo (2005) has concluded the boundary approach of territoriality to be “fruitless and ill-applied” in the digital realm.

Similarly, Kobrin (2001) recognises among underlying assumptions, that regulating activities on the internet will be problematic with existing territorial jurisdictions. The vectorial nature of territoriality is emphasised and the difficulty of assigning two-dimensional, fixed geographical coordinates to online activities is brought forth. Adopting this stance, Kobrin (2001) identifies two primary reasons for this “disconnect between geographic jurisdiction and cyberspace.” One being the difficulty of law enforcement online, and the other being the unsteady conceptual basis for the governance of cyberspace.

The above literature has both reinforced and confuted this paper’s argument. It must be borne in mind that these and the subsequent arguments made only consider existing technology and cannot account for any future technological advancements that may result in factors like the impracticality of the application diminishing in value. Nevertheless, the above presented perspectives provide a basis for the central arguments of this paper to be made.

CENTRAL ARGUMENTS

While the above vantage points against applying territoriality online are valid, with respect to IP law, they may be further extended. Elaborating on the enforcement issues noted above by Kobrin, in the realm of IP law, this is most prominently seen by applying the example of U.S. copyright law digitally. Some U.S. courts applied American copyright law to a multinational infringement since the root act infringed U.S. copyright law. However, U.S law cannot be applied to violations that occurred outside U.S. boundaries since these extraterritorial infringements were not rooted in U.S. copyright (Ginsburg, 1995). The Ninth Circuit thus held that the foreign reproductions did not infringe U.S laws (Ginsburg, 1995). Applying this situation to a digital multinational copyright infringement, it can be argued that attempting to generalise an IP violation as being contrary to the law of solely one nation is impractical since the internet circumvents geographical boundaries, as previously discussed. Distinguishing between nations itself is impossible in a realm of fluctuating borders. This evidence shows that considering the shortcomings of existing technology, territoriality is an outdated concept that cannot be applied to the confine-less internet.

Opponents to this argument may claim that implementing territoriality online encourages creators to publicise their works digitally as they will be protected by their nation’s IP laws, thus benefiting innovation. Moreover, the issue discussed above of not being able to apply a single nation’s IP laws in the event of a violation would be resolved if clear boundaries somehow existed, provided technology permits in the future. Aside from the sheer impracticality that currently exists, this viewpoint ignores that nations may restrict the flow of information internationally. Further, if territoriality existed online and one country could claim patent/copyright for a specific creation, potential iterative development could be stifled as international creators are limited in terms of the existing material they may

engage with.

Further arguments are put forth when we consider the negative consequences of implementing territoriality online. For instance, the internet may morph into a fragmented realm with different countries setting varying laws and regulations within their territories. Resultantly, users are confronted by differing laws across the internet, leading to confusion and inconsistency. An increase in online IP violations due to unawareness of different legal standards is likely to be the outcome. This is inimical to Bingham’s (2011) principle of accessibility, associated with the rule of law, stating that “the law must be accessible, and so far, as possible, intelligible, clear and predictable.” Applying territoriality online may thus bring into question the fundamental concept of rule of law itself.

From an economic standpoint, the potential negative consequences of applying territoriality digitally refute the claims of those like Oke, Kur, and Drier who reason that tailoring national IP laws via territoriality online brings forth economic prosperity. To elucidate this further, the compliance cost for businesses attempting to establish a digital presence across countries increases as they must manoeuvre around varying IP laws of digital territories to sell/promote their products. If firms then choose to not supply their products to some areas of the internet, consumers restricted within those digital areas have less access to products they need and/or want (Moynihan & Titley, 2016). If this results in a decrease in consumer expenditure, economic growth is threatened and nations risk experiencing recessions.

Some firms may attempt to counter the increasing production cost by increasing prices of their products. This decreases the affordability of goods and services, restricting the ability of consumers on lower incomes to purchase them. Alternatively, businesses may lay off workers, resulting in greater unemployment and reduced output of final goods and services. Pressure is therefore placed on national governments to provide higher unemployment benefits, with the opportunity cost of doing so also arising. The funds spent could have been used for the provision of other public goods instead. Thus, a vital economic objective of maintaining low unemployment is risked, along with prospects for economic growth (Moynihan & Titley, 2016).

Therefore, applying the territoriality principle online could have wide reaching undesirable economic consequences, bolstering this paper’s viewpoint against its application.

CONCLUSION

Thus, it has been proven following in-depth investigation, analysis, and consideration of multiple viewpoints that the principle of territoriality should not be applicable online. With existing technology, it is impossible to define clear digital boundaries, making the application unfeasible to begin with. If this did materialise, however, there are the above analysed baleful implications. The rule of law itself is called into question alongside undesirable economic outcomes. In conclusion, this paper adopts and maintains the stance that with regards to

IP law, the principle of territoriality should not be applicable online.

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